

**UNITED
NATIONS**

IT-98-29/1-A
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International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-98-29/1-A
Date: 22 April 2009
Original: English

IN THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision of: 22 April 2009

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

CONFIDENTIAL

**DECISION ON URGENT PROSECUTION MOTION
CONCERNING PUBLIC FILINGS OF DRAGOMIR
MILOŠEVIĆ**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

PM

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal”, respectively),

NOTING the “*Mémoire de l’Appelant déposé par la Défense avec les annexes confidentiels [sic] A et B et annexes publics [sic] C et D*”, filed publicly (with confidential annexes) by Counsel for Dragomir Milošević (“Milošević”) on 14 August 2008 (“Defence Appeal Brief”);¹

NOTING the “*Requête aux fins de présenter les moyens de preuve supplémentaires*”, filed confidentially by Milošević on 10 November 2008,² and his “*Requête additionnelle aux fins de présenter les moyens de preuve supplémentaires*”, filed confidentially on 19 February 2009 (collectively, “Rule 115 Motions”);³

NOTING that, on 19 March 2009, Milošević filed public versions of his Rule 115 Motions (“Public Rule 115 Motions”) and re-filed publicly the Defence Appeal Brief, with the exclusion of the Annexes;

BEING SEISED OF the “*Urgent Prosecution Motion Concerning Public Filings of Dragomir Milošević*” filed confidentially on 26 March 2009 (“Motion”), in which the Office of the Prosecutor (“Prosecution”) submits that certain portions of the Public Rule 115 Motions and of the Defence Appeal Brief disclose confidential information;⁴

RECALLING the confidential “Order on Urgent Prosecution Motion Concerning Public Filings of Dragomir Milošević” issued on 26 March 2009, in which the Pre-Appeal Judge requested the Registry of the International Tribunal (“Registry”) to withdraw the Public Rule 115 Motions, including their English translations, from public circulation, and to make confidential and remove from public circulation all versions of the Defence Appeal Brief, including the English translation thereof, until further notice;⁵

NOTING the “*Conclusions [sic] en réponse de Urgent Prosecution Motion Concerning Public Filings of Dragomir Milošević*”, filed confidentially by Milošević on 1 April 2009

¹ The English translation was filed on 11 September 2008.

² The English translation was filed on 10 December 2008.

³ The English translation was filed on 26 February 2009.

⁴ Motion, para. 2.

⁵ Order on Urgent Prosecution Motion Concerning Public Filings of Dragomir Milošević, 26 March 2009, p. 2.

("Response"),⁶ and the "Reply to '*Conslusions [sic] en réponse de Urgent Prosecution Motion Concerning Public Filings of Dragomir Milošević*'", filed confidentially by the Prosecution on 3 April 2009 ("Reply");

NOTING that the Prosecution submits that the Public Rule 115 Motions reveal the confidential contents of the material provided under Rule 70 of the International Tribunal's Rules of Procedure and Evidence ("Rules"), namely the Diary of UNPROFOR officer Louis Fortin ("Fortin Diary");⁷

NOTING that the Prosecution further submits that, while its review of the Defence Appeal Brief is still ongoing, it has already identified some portions thereof revealing confidential information, namely a quote from an exhibit under seal, a quote from the confidential statement of a protected witnesses, and various references revealing the content of other confidential transcripts and documents;⁸

NOTING that the Prosecution requests the Appeals Chamber to order (i) "that the Public Rule 115 Motions and all versions of the Defence Appeal Brief be made confidential and removed from public circulation"; and (ii) "that Milošević file properly redacted versions of his Rule 115 Motions and Defence Appeal Brief";⁹

NOTING that the Prosecution alternatively submits that Milošević could be dispensed from filing public redacted versions of his Rule 115 Motions, "as most of these motions would have to be redacted";¹⁰

NOTING that Milošević responds that his Rule 115 Motions do not reveal the confidential content of the Fortin Diary, but rather refer to information already disclosed in a public filing by the Prosecution and in an Appeal Chamber's decision;¹¹

⁶ The English translation was filed on 8 April 2009.

⁷ Motion, para. 2 and Annex C. See also Reply, paras 4-5.

⁸ Motion, para. 2, fn. 6, referring to paragraphs 37 and 254 of the Defence Appeal Brief, respectively disclosing the contents of Exhibit P625, under seal, and of confidential statements of protected witness W12. See also Reply, para. 6, fns 10 and 11.

⁹ Motion, para. 4.

¹⁰ Motion, para. 4, fn. 7.

¹¹ Response, paras 5-6 and fns 5-6, referring to Prosecution Response to Milošević's Motion to Present Additional Evidence, 10 December 2008, public redacted version; and, respectively, Decision on Dragomir Milošević's Motion to Present Additional Evidence, 20 January 2009 ("Decision of 20 January 2009").

NOTING that Milošević also claims that if the Prosecution wanted to maintain the confidentiality of the Fortin Diary, it should have requested the appropriate measures from the competent Chamber prior to disclosing this material to him;¹²

NOTING that Milošević further submits that the Defence Appeal Brief does not contain any information capable of jeopardizing protected witnesses or of revealing confidential information;¹³

CONSIDERING that all submissions filed before the International Tribunal shall be public unless there are exceptional reasons for keeping them confidential, and that parties shall file public redacted versions of all confidential briefs filed on appeal;¹⁴

NOTING, with respect to the Rule 115 Motions, the Prosecution's letter to Milošević dated 1 April 2008 announcing the disclosure of the Fortin Diary, in which the Prosecution enumerated the conditions upon which the provider of the Rule 70 material accepted that it be disclosed to Milošević, including the confidentiality of its contents;¹⁵

RECALLING that the purpose of Rule 70 of the Rules is to encourage States, organisations and individuals to share sensitive information with the Tribunal and that this provision "creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected";¹⁶

CONSIDERING that Rule 70 of the Rules does not require the Prosecution to apply to a Chamber to maintain the confidentiality of the Rule 70 material before disclosing it to an accused;

FINDING that the Public Rule 115 Motions revealed the content of the Fortin Diary beyond the parts of this evidence that were made public either by the Decision of 20 January 2009 or the Prosecution, thus constituting a breach of confidentiality;

¹² Response, para. 8.

¹³ Response, para. 11.

¹⁴ *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Order to Appellant Hassan Ngeze to File Public Versions of His Notice of Appeal and Appellant's Brief, 30 August 2007, p. 2; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Vinko Martinović's Withdrawal of Confidential Status of Appeal Brief, 4 May 2005, p. 3; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Order, 17 September 2004, p. 2.

¹⁵ Motion, Annex C.

¹⁶ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19.

CONSIDERING further that Milošević's Rule 115 Motions are specifically focused on the contents of the Fortin Diary, so that public redacted versions of these filings would be hardly comprehensible because significant portions thereof should be redacted;

CONSIDERING that it is therefore appropriate to exonerate Milošević from the obligation to file public redacted versions of his Rule 115 Motions;

RECALLING, with respect to the Defence Appeal Brief, that the protection of witnesses and victims is of utmost importance to the proper functioning of the International Tribunal and, once protective measures have been ordered in any proceedings before the International Tribunal, they continue to have effect on appeal or in any other proceedings unless they are modified by the competent Chamber;¹⁷

RECALLING further that it is not for the parties to decide what aspects of a confidential testimony or exhibit can be disclosed and that, if a party considers that public disclosure of information under seal becomes necessary, it can move the appropriate Chamber for a variation of the protective measures;¹⁸

FINDING that the Prosecution has identified in the Defence Appeal Brief at least one quote from a confidential exhibit,¹⁹ and that it is otherwise Milošević's responsibility to identify and redact all such instances in his filings;

CONSIDERING that Milošević may publicly refer to the existence of confidential exhibits or testimonies to support his assertions²⁰ so long as he does not disclose confidential information contained therein;

NOTING further that the Pre-Appeal Judge instructed Milošević to file a public redacted version of his "*Acte d'appel déposé par la Défence [sic] contre le Jugement de première*

¹⁷ Cf. Rule 75 of the Rules. See also *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Prosecution Motion Concerning Public Redacted Version of Milan Martić's Appellant's Brief, 21 April 2008 (confidential), p. 3; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Decision on Prosecution's Motion to Seal Defence Appeal Brief, 10 May 2007 (confidential) ("*Orić Decision*"), p. 3.

¹⁸ *Orić Decision*, p. 3.

¹⁹ Defence Appeal Brief, para. 37.

²⁰ The Appeals Chamber notes in particular that the Trial Judgement refers to exhibits under seal and, in some cases, their titles, as well as the dates and pages of closed session testimonies transcripts, without, however, revealing any confidential contents thereof.

instance” filed confidentially on 11 January 2008 (“Notice of Appeal”),²¹ but that no such filing has been made to date;²²

PURSUANT TO Article 22 of the Statute of the International Tribunal and Rules 53, 54, 65*ter*, 70, 73, 75, 79 and 107 of the Rules;

HEREBY GRANTS the Prosecution Motion;

ORDERS Milošević to file, after having performed all the necessary redactions, within 20 days from the date of this decision, public versions of his Notice of Appeal and Defence Appeal Brief;

INSTRUCTS Milošević to clearly mark the redactions in the text of the public version by substituting all confidential information with the word “redacted”;

ORDERS Milošević to retrieve, within three days from the date of the present decision, any version of his Defence Appeal Brief or Rule 115 Motions that he may have distributed to a third party, and to inform any such recipient that he or she must not disclose the confidential information contained therein;

INSTRUCTS the Registry that all previous versions of Milošević’s Rule 115 Motions and the Defence Appeal Brief, including the English translation thereof, be kept confidential.

Done in English and French, the English text being authoritative.

Dated this 22nd day of April 2009,
At The Hague, The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

²¹ The English translation was filed on 16 January 2008.

²² Status Conference, 11 March 2009, AT, 27.